FOO POH SANG & ORS.

v.

YUEN LUM SDN. BHD. & INTERVENER

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 32-95-87]
6 OCTOBER 1988

LAND LAW: *Plaintiff sold land to defendant - Caveat lodged to protect interest of plaintiff - Defendant charged land to intervener for financing - Charges created by defendant in favour of intervener/chargee - Default by defendant - Application by plaintiff for Mareva injunction - Intervener applied to set aside injunction - The questions to be tried by the Court.*

The plaintiff by an agreement, agreed to sell to the defendant a piece of land.

In breach of the abovesaid contract, the defendant defaulted in his payments. The plaintiff commenced legal proceedings and obtained judgment against the defendant and further sought and was granted an interlocutory injunction restraining the defendants, by its servants, or agents from selling or disposing of the land. Asia Commercial Finance, the chargee provided loans to purchasers who had bought sub-divided lots on the said property.

The chargee applied to be added as a party to the proceedings and thereafter to set aside the interlocutory injunction granted to the plaintiff.

The intervener was allowed to intervene but the application to set aside the interlocutory injunction wholly was dismissed.

The intervener now appealed and submitted that the injunctive order in question was a caveat in the guise of an injunction and once the caveat was removed, the injunctive order could not remain.

Held:

[1] The plaintiff had satisfied the Court that there was a risk of dissipation of the defendants assets, therefore the injunction was to remain.

[2] The intervener's rights as a chargee under the National Land Code could not be interferred with by the plaintiff.

[3] The injunctive order was to be varied as not to prejudice the intended foreclosure proceedings at the instance of the intervener/chargee.

[Application dismissed.]

Cases referred to:

S & F International Ltd. v. Trans-con Engineering [1985] CLJ (Rep) 280
Ninemia Maritime Corporation. v. Trave, [1984] 1 All ER 398
Eng Mee Yong v. V. Letchumanan [1979] 2 MLJ 212
Nanyang Development v. How Swee Poh [1979] 1 MLJ 145
American Cyanmid v. Ethicon Ltd [1975] AC 396

For the plaintiffs - Ronnie Teo, (Ng Seng Lee & Foo San Choong with him) M/s. Yeoh Kian Teik & Co.

For the intervener - Ngan Siong Hing; M/s. Abbas & Ngan.

JUDGMENT

Peh Swee Chin J:

The above-named intervener had applied by summons to be added as a party to the proceedings and thereafter to set aside an interlocutory injunction granted *ex-parte* in favour of the plaintiff against the defendant, (and be it noted, not against the intervener). This Court granted the application of the intervener to intervene but dismissed the intervener's application to set aside the said interlocutory injunction wholly, with the Court instead varying the said interlocutory injunction to protect what appeared to be the interest of the intervener as chargee of the land to which the interlocutory injunction had related; and ordering the plaintiff to pay half the costs of the application to the intervener.

Despite the nature of the order made the intervener has now appealed from it. It will be necessary to recapitulate the facts leading to the order made.

The plaintiff entered into an agreement with the defendant to sell a piece of land to the defendant who apparently was a housing developer with provisions for payment of the purchase price of RM2.4 million of which RM40,000 was paid on signing the agreement. The defendant had defaulted, in leaving a balance sum of RM1,460,000 still unpaid.

It was provided in the agreement for the plaintiff to execute a valid and registerable transfer of the land and for the said transfer to be held by stakeholders until a bank loan (on the security of the title to the land) had been obtained and the purchaser was ready to pay the balance of the purchase price.

The land was subsequently registered in the name of the defendant who had created charges on it in favour of the intervener, the chargee, for sums which appeared to be well in excess of RM2.5 million.

It was also provided *inter alia* in the agreement that on breach of obligations including one of paying the instalments towards the purchase price, the plaintiff would be entitled to forfeit the deposit or 10% of the purchase price whichever was the lesser. The plaintiff issued a notice of legal proceedings, followed by the writ of action.

The plaintiff claimed in the action against the defendant for an order of transfer or retransfer of the land, injunction against disposal of the land etc. and in the alternative, the balance sum of RM1,460,000, damages for breach and costs.

The defendant entered an appearance on 13 January 1988 and before that, the plaintiff applied for and obtained on 5 October 1987 the interlocutory injunction *ex parte*, restraining the defendant, by its servants, or agents etc. from selling or otherwise disposing of the land until further order.

The land had since been sub-divided into a large number of lots on which houses were being built and sold to a fairly large number of purchasers who had apparently obtained housing loans from the intervener from whom the defendant had apparently obtained what is known in the building trade as "bridging finance" to build the houses.

Earlier, the plaintiffs had lodged a caveat against the land apparently to attempt to protect their interest by virtue of the agreement. Such caveat was removed by the Court apparently on an application by the intervener who then applied to intervene and set aside the interlocutory injunction.

The intervener in support of its application said that it was the chargee of the land, (it goes without saying that it must be, also the chargee of the sub-divided lots derived from the original land,) charged to secure a sum of more than RM2.5 million as particularized in the affidavit filed. It said that since there was a caveat (which I mentioned earlier as having been since removed), the injunction was bad and ought to be removed. Further, there was no caveatable interest. The intervener further referred to innocent purchasers of some of the sub-divided lots who had obtained housing loans from the intervener and the injunction was affecting the intervener and the innocent purchasers; and stated that the civil action here was a matter strictly between the plaintiff and defendant, the present suit having nothing to do with the intervener and the innocent purchasers. The intervener lastly said that in view of default of certain payments on the part of the defendant, it wished to take legal action under the National Land Code as chargee (for order of sale by public auction.)

Plaintiffs in reply said, *inter alia*, that injunction was obtained solely against the defendant, and that an injunction could be applied for in addition to a caveat already lodged, and that the issue of caveatable interest was irrelevant in the present suit. On the complaint presumably that the innocent purchasers had failed to pay instalments of housing loans it was brought about by the defendant stopping work of construction. Plaintiffs further said that it was clear that the injunction obtained would not affect "sales" or "transfers" of the sub-divided lots prior to the date of the injunction order and that none of the innocent purchasers had sought to intervene in these proceedings. The interest of the innocent purchasers had no bearing on the intended foreclosure proceedings by the intervener against the defendant and that the civil suit had nothing to do with the intervener.

Learned Counsel for the intervener in his submission took two points in addition to what has been stated above by his client. First, the injunction could not remain when the caveat was removed as the injunction order was merely a caveat under the guise of an injunction. Secondly, since the plaintiffs had totally divested themselves of their interest in the land, it would be inequitable for the injunction to remain.

In reply, learned Counsel for the plaintiffs said the injunction was merely an analogy of the caveat, (and not the same). Plaintiffs were not disputing the rights of the intervener as a chargee under the National Land Code but the injunction obtained in the form of a *Mareva* injunction was to stop the defendant from dissipating its assets. Plaintiffs had mentioned fraud by the intervener on the innocent purchasers and also on the interveners on account of granting further loan on executing further charge or charges and on paying defendant 100% of housing loans when houses were completed to the extent of 80% only. Learned Counsel submitted that the remedy for the intervener should be by way of foreclosure proceedings to which the plaintiffs would not object. Counsel said that intervener's manager had said also that it was a *Mareva* injunction that was obtained herein.

Learned Counsel for the intervener had, in reply, submitted that the injunction was not a *Mareva* injunction and if it was, the criteria had not been met. Alleged fraud was uncalled for.

In my view, it was apparent that the innocent purchasers had never intervened in the proceedings to, *inter alia* set aside the injunction. Learned Counsel for intervener was of course not acting for such innocent purchasers, who would be perfectly entitled to so intervene, if they thought it fit and any Court would grant any remedy which they ought to deserve on such intervention. Save speaking in connection with the obligation by the innocent purchasers to keep up with instalments of housing loans in respect of which they had allegedly become recalcitrant, causing concern to the intervener, learned Counsel for the intervener could not have spoken for the innocent purchasers with any authority.

In my view the intervener's right as a chargee under the National Land Code could not be interfered with by the plaintiffs who admitted as much and expressly stated they had no objection to such right. The Court had therefore varied the injunctive order by adding the words to the effect that nothing in the order should prejudice at all in any way the foreclosure proceedings under the National Land Code which the intervener had intended to take in its capacity as chargee. The coast was thus clear for it to exercise its right for all its remedies.

However, the intervener wanted more, i.e., the removal of the injunction itself, seemingly taking up the cudgels on behalf of the innocent purchasers as well. Its manager said it was a *Mareva* injunction that the plaintiffs had obtained and the plaintiffs readily conceded it was. The intervener said to the effect that the requirements had not been complied with by the plaintiffs who said they had. Assuming that the intervener had the right of complaint about such requirements, (though it had no such right), had plaintiffs then satisfied the requirements for obtaining a *Mareva* injunction?

First, the plaintiffs had satisfied the Court they had a good arguable case with regard to the balance of the purchase price remaining unpaid. Secondly, they had satisfied the Court there was a risk of dissipation of the only known asset i.e., the land, as after all the defendant had been selling the sub-divided lots derived from the land, and further that the probity of the defendant was not to be relied on by the failure to pay instalments towards the purchase price without even bothering to give any explanation therefor. Thirdly, the Court took into account plaintiffs' evidence and unfortunately none from the defendant, who proffered no evidence. Please see the case of Federal Court in *S & F International Ltd. v. Trans-con Engineering* [1985] CLJ (Rep) 280; *Ninemia Maritime Corporation v. Trave* [1984] 1 All ER 398.

The plaintiffs had satisfied the requirements for a *Mareva* injunction, (of which the injunctive order in question was one), to be issued. I must hasten to add that it still remains for the innocent purchasers to rise from their slumbers on whatever rights they should perceive they have.

I found the allegation of fraud from the plaintiffs against the intervener too far-fetched to be of any value in this application to set aside the injunction.

Finally, I will deal now with the major submission of intervener that that the injunctive order in question was a caveat in the guise of an injunction and once the caveat was removed, the injunctive order could not remain.

The Court could not accede to this submission. In my judgment, there are real though subtle, differences between the two. A caveator, when called upon to justify his caveat, would have to satisfy the Court, (when he is not a registered owner), that he has a caveatable interest in the land in question. Please see *Eng Mee Yong v. V. Letchumanan* [1979] 2 MLJ 212;

Nanyang Development v. How Swee Poh [1970] 1 MLJ 145. Caveatable interest is, of course, very fortunately and conclusively though compendiously set out in s. 323(1) of the National Land Code as follows:

> 323. (1) The persons and bodies at whose instance a private caveat may be entered are:
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> (a) any person or body claiming title to, or any registrable interest in any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
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> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para. (b).

On the other hand, an injunction can restrain a person from doing anything, not just concerning land. When it applies to land, it is not dependent on the presence or absence of any caveatable interest for it to issue, such as a *Mareva* injunction, the requirements of which were discussed earlier. A caveatable interest is, of course, a relevant but by no means *sine qua non* for an injunction to issue.

Just to mention another difference mentioned by the learned Lord Diplock himself in *Eng Mee Yong*, a caveat is registered by a Registrar of titles always *ex parte* acting in an administrative capacity and not if I may myself add, in a judicial or quasi-judicial capacity.

The similarities between a caveat and an interlocutory injunction concerning land lie mainly in the matter of the balance of convenience which was itself explained by learned Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] AC 396. The matter of balance of convenience arises when a Court hears an application until final trial for example, for extending a caveat or continuing or applying for an interlocutory injunction.

Again, apart from and before the balance of convenience spoken of above arises, an applicant for an interlocutory injunction or for continuing it must satisfy the Court that there is a serious question to be tried; a question that is not frivolous or vexatious, as regards his claim at the trial for a permanent injunction or other remedy in aid of which the interlocutory injunction is sought.

Similarly, an applicant (caveator) for extending a caveat would have to satisfy the Court that there is a similarly serious question for trial as regards his claim to a registerable interest in the land etc. under s. 323 of the National Land Code. Please see his lordship's elucidation of the same in *Eng Mee Yong's* case.

In view of what has been stated above and especially the fact that both parties appeared and professed to treat the injunction in question as one of *Mareva's* type with which I also agreed, the submission about the removal of the caveat in question involving *ipso facto* the discharge of the interlocutory injunction fell to the ground.

I therefore as stated earlier, varied the injunctive order so as not to prejudice in any way the intended foreclosure proceedings at the instance of the intervener/chargee, but dismissed his application to set it aside wholly.

Also found at [1989] 1 CLJ 440